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IN THE SUPREME COURT OF THE UNITED STATES

Spring Term, 1976

No. 75-1047

KEITH ANTHONY GRANT,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

****

ON APPEAL FROM JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

****

PETITION FOR WRIT OF CERTIORARI

****

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Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit entered December 24, 1975.

CITATIONS TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is set out in the Appendix hereto, pp.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on December 24, 1975, and is set out in the Appendix hereto. Jurisdiction of this Court is invoked under 28 U.S.C. sec. 1257(3), petitioner having asserted below and asserting here deprivation of rights secured by the Constitution of the United States.

QUESTIONS PRESENTED

1. Was prejudicial and reversible error committed when the trial court failed to grant the Defendant's Motion for Acquittal made at the close of the State's evidence?

2. Was prejudicial and reversible error committed when the trial judge examined and cross-examined witnesses in a manner favorable to the government, thereby becoming an advocate for the government?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

CONSTITUTION OF THE UNITED STATES

Amendment VI.

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and district wherein the crime shall

have been committed, which district shall have been previously ascertained by law and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in its favor and to have the assistance of counsel for his defense.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of the law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTES OF THE UNITED STATES

26 U.S.C.A. IRC 1954 Sec.5861(d)

It shall be unlawful for any person to receive or possess a firearm which is not registered to him in

the National Firearms Registration and Transfer Record.

26 U.S.C.A. IRC 1945 Sec. 5871

Any person who violates or fails to comply with any provision of this Chapter shall, upon conviction, be fined not more than $10,000.00 or be imprisoned not more than 10 years or both and shall become eligible for parole as the Board of Paroles shall determine.

STATEMENT OF THE CASE

On or about October 31, 1974, Detective John Jones of the Greensboro, North Carolina Police Department obtained a State search warrant for the person and residence of defendant, Keith Anthony Grant, located at 300 Milburn Street, Greensboro, North Carolina.

Detective Jones testified that he and other officers went to the Defendant's residence and that the Defendant was not there. The roommate was there and let him into the house. Detective Jones further testified that the roommate, a Mr. Williamson, was read the warrant prior to the search. Detective Jones stated that they had previously stopped a car which Williamson was driving, thinking the driver to be the Defendant and that Williamson subsequently let them into the house with a key.

Detective Jones further stated that in searching the house, they found a quantity of marijuana in a front bedroom of the house at which time he advised Williamson that he was under arrest. Detective Jones further stated that in a rear bedroom they found another quantity of marijuana and $9,000.00 in cash in a locked box on the top shelf of a closet in the rear bedroom. Detective Jones testified that a sawed-off shotgun was found on the headboard of a bed in the same room and that the $9,000.00 plus a check and savings book with the shotgun were turned over to the Police Department. The Defendant subsequently claimed the $9,000.00. Special Agent William D. Gentry of the ATF stationed in Wilkesboro, North Carolina, testified that he arrested the Defendant on November 26, 1974, and that the Defendant was warned of his rights.

The Defendant, Keith Anthony Grant, was tried without a jury on June 10, 1975 in the United States District Court for the Middle District of North Carolina, Greensboro Division, on a complaint charging, to wit: That Keith Anthony Grant did "unlawfully possess a firearm as defined in Title II of the Gun Control Act of 1968, which had not been registered as required by law and in violation of Title 26 Sec. 5861(d) U.S. Code", the alleged violation being one conferring jurisdiction upon the United States District Court. The Defendant entered a plea of not guilty to the charge.

The Defendant made a motion for acquittal. The motion was denied by the court.

The judge sitting as jury returned a verdict of "guilty" as charged in the complaint. It was the judgment of the Court that the Defendant Grant be imprisoned for a period of 18 months. On the said judgment, the Defendant gave timely notice of appeal to the United States Circuit Court of Appeals for the Fourth Circuit. The judgment of the United States District Court for the Middle District of North Carolina, Greensboro Division, was affirmed by the United States Court of Appeals for the Fourth Circuit.

REASONS FOR GRANTING THE WRIT

I. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PREJUDICIAL AND REVERSIBLE ERROR WAS COMMITTED WHEN THE TRIAL COURT FAILED TO GRANT THE DEFENDANT'S MOTION FOR ACQUITTAL MADE AT THE CLOSE OF THE STATE'S EVIDENCE. THE DEFENDANT WAS DENIED HIS CONSTITUTIONAL RIGHTS GUARANTEED BY THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT OF THE UNITED STATES CONSTITUTION IN THAT THE PROSECUTION FAILED

TO PROVE BEYOND A REASONABLE DOUBT EACH AND EVERY ELEMENT OF THE CRIME CHARGED. Mullaney v. Wilber, 95 S.Ct. 1881 (1975) In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368.

The Government relied on a theory of constructive possession in its attempt to lay ownership of the sawed-off shotgun in question to the defendant. It has been held that constructive possession of a firearm proscribed by the Federal Firearms Law exists when a person does not have actual possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over the firearm in question. (Emphasis added). 26 U.S.C. IRC 1954 Sec. 5861(d), 5871; U.S. v. Craven, 478 F.2d 1329 (6th Cir. 1973); U.S. v. Burch, 313 F.2d 628 (6th Cir. 1963).

In Craven, the defendant was indicted under 26 U.S.C. Sec. 5861(d), Sec. 5871 for constructive possession of an unregistered automatic carbine among other things. The Court held that possession of the residence alone was insufficient to establish possession of all the contents of the house and that there must be additional proof to convict. The Court went on to say that such events as placing the Defendant in the room with the gun at any previous point in time plus a statement made by the Defendant

would be such additional proof. Furthermore, the Court went to great lengths to define constructive possession and basically set forth three elements of constructive possession. They are as follows: (1) knowledge; (2) Power to exercise, dominion and control; (3) Intention to exercise dominion and control. The government's evidence being structured to prove constructive possession of the shotgun is through a showing that the Defendant claimed $9,000.00 found in a closet in the room. The government contends that since the Defendant claimed the $9,000.00 that was found in a closet in the room, he was estopped to deny possession of the shotgun which was located on the headboard of a bed in the room. The government failed to present any evidence of the Defendant's knowledge of the presence of the shotgun or his intention to exercise dominion and control over the weapon found in the residence. In the absence of such a showing by the government, the government has failed to produce sufficient evidence on which a finding of constructive possession can be based. It follows that if the essential elements of the charge against the Defendant, i.e., constructive possession, has not been proved by the government, then the Defendant's Motion for Acquittal should have been granted by the Court, there being insufficient evidence to support any finding of guilt beyond a reasonable doubt.

The United States Court of Appeals

for the Fourth Circuit correctly cited Craven for the definition of constructive possession as set forth in the Court's opinion; however, the Appellate Court nevertheless disregarded the fact that the government failed to present any evidence of the Defendant's knowledge of the presence of the shotgun or his intention to exercise dominion and control over the weapon found in the residence. Therefore, the Court of Appeals affirmed the District Court's decision despite the fact that the government failed to prove beyond a reasonable doubt all the elements of the charge, thereby denying the defendant due process of the law as guaranteed by the Fourteenth Amendment of the United States Constitution. United States v. Mullaney, Supra.

In Petty v. People, 447 P.2d 217 (Colo. 1968), Smith and Petty were roommates in an apartment. During a search, marijuana was found in one of the rooms of the apartment. The Supreme Court of Colorado held that the State had failed to prove possession by Smith. The Court held that there must be statements or other circumstances beyond possession but not exclusive possession of the apartment to show that the Defendant knew of the presence of marijuana there and had control of it. In accord, Evans v. U.S., 257 F.2d 121 (9th Cir. 1958), Guevara v. U.S., 242 F.2d 745 (5th Cir. 1957). The record in the case at bar

does not reveal any statement made by the Defendant but seeks to rely solely on the defendant's claiming the $9,000.00 found in a remote closet of the room. The Government has sought to develop a logical nexus between two separate events, i.e., the finding of the $9,000.00 in a closet and the finding of a sawed-off shotgun on the headboard of a bed in the same room. The only nexus between the $9,000.00 and the sawed-off shotgun is that they were found in the same apartment. The government itself admits that the apartment was shared by another individual as was the case in Petty v. People. The aforementioned cases clearly hold contra to this line of reasoning as affirmed by the Court of Appeals.

It is the general rule of substantive law in North Carolina, when passing on the legal sufficiency of the evidence that where the State has relied on circumstantial evidence for conviction of a criminal offense, the facts established or advanced on hearing must be of such a nature and so connected or related as to point unerringly to the defendant's guilt and to exclude any other reasonable hypothesis. (Emphasis added). State v. Rogers, 252 N. C. 499, 114 S.E.2d 355 (1960).

In the case at bar, the Government's evidence tends to show that a purported roommate had a key to the house. The Government at no point introduced evidence

showing the purported roommate was not the owner of the weapon. Therefore, the Government failed to rebut the most reasonable of all hypotheses: That the roommate could in fact have been the possessor of the weapon. The Government failed to have the purported roommate testify, even though his denial of possession under oath would have made a possible case for the government. The Court, in Evans v. U.S., 257 F.2d 121 (9th Cir. 1958), held that where the Defendant was not in exclusive control of the premises, it may not be inferred that he knew of the presence of the contraband and had control of it unless there are other incriminating statements and circumstances tending to give rise to an inference. In the instant case, there are no other incriminating statements or circumstances which give rise to an inference that the Defendant knew of the presence of the shotgun and intended to exercise dominion and control over the same.

In State v. Massey, 86 S.Ct.618 620 (1881), the Supreme Court clearly stated:

> **Every man is presumed to be innocent until the contrary is proved and it is a well established rule in criminal cases that if there is a reasonable hypothesis upon**

> which the circumstances are consistent with the innocence of the party accused, the court should... acquit for the reason that proof fails to sustain the charge. The guilt of a person is not inferred because the facts are consistent with his guilt, but they must be inconsistent with his innocence.

It is clear that the evidence in the case at bar is not inconsistent with the defendant's innocence. Furthermore, it is clear from the cases that the mere fact of a shotgun occupying the same room in plain view as $9,000.00 hidden in the closet does not constitute a circumstance which would tend to raise an inference that the defendant owned the gun because he claimed the money where it is not shown that the Defendant had exclusive control and dominion over the house. U.S. v. Craven, 478 F.2d 1329 (6th Cir. 1973). State v. Hood, 89 Montana 432, 298 P.2d 354; State v. Rogers, 252 N.C. 299, 114 S.E.2d 355 (1960); Evans v. U.S., 257 F.2d 121 (9th Cir. 1958); Ohio v. Dempsey, 259 N.E. 2d 745 (1970).

The due process clause of the Fourteenth Amendment of the United States Constitution requires that the prosecution prove beyond a reasonable doubt each and every element essential to the

crime charged against the defendant. Mullaney v. Wilber, 95 S.Ct. 1881 (1975); In Re Winship, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368. On the basis of the aforementioned authorities, it is clear that the Government failed to prove beyond a reasonable doubt, the defendant's constructive possession of the sawed-off shotgun in question, since the government failed to prove the three essential elements of constructive possession beyond a reasonable doubt, i.e., knowledge, intention to exercise dominion and control, and power to exercise the same. Mullaney v. Wilbur, Supra. It follows that the District Court committed prejudicial and reversible error in refusing to grant the defendant's motion for acquittal made at the end of the Government's evidence. The Court of Appeals affirmed this error.

II. THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER PREJUDICIAL AND REVERSIBLE ERROR WAS COMMITTED WHEN THE TRIAL JUDGE EXAMINED AND CROSS-EXAMINED WITNESSES IN A MANNER FAVORABLE TO THE GOVERNMENT, THEREBY BECOMING AN ADVOCATE FOR THE GOVERNMENT. THE DEFENDANT WAS DENIED HIS SIXTH AMENDMENT RIGHT TO

A FAIR TRIAL AS GUARANTEED BY THE UNITED STATES CONSTITUTION. Crampton v. Ohio, 91 S.Ct. 1454 (1971). In Re United States, 286 F.2d 556 (1961).

The Sixth Amendment of the United States Constitution guarantees the criminal defendant the right to a fair trial. In the instant case, the defendant waived his Sixth Amendment right to a jury trial, but at no time did he waive his right to a fair trial before an impartial trier of fact.

The trial judge is granted broad discretion in his conduct of a criminal trial. The law recognizes the principle that the District Court judge in a criminal case may ask questions of the witnesses in an effort to elicit the truth. Glasser v. United States, 62 S.Ct. 457 (1942) Rehearing denied, 62 S.Ct.629 (1942). It is clear that the role of the Federal trial judge is not viewed as that of an umpire, but is viewed in terms of a duty to make sure that all witnesses are asked questions necessary for disclosing and clarifying essential facts in the case being tried. United States v. Rosenberg, 195 F.2d 583 (1952) cert. denied 73 S.Ct. 20 (1952). However, it is likewise clear that although the trial judge has a duty to see that facts are clearly presented and is

accordingly authorized to ask pertinent questions of a witness to that end, he is nevertheless still limited in his function to examine and cross-examine witnesses by the United States Constitution. That is, a Federal judge's discretion will be upheld by the Courts but only so long as the conduct of the judge does not violate the rights of the criminal defendant as spelled out in the United States Constitution.

It is a principle of the law that a trial judge exceeds the scope of his duties when he takes the conduct of a case away from counsel. In Re United States, 286 F.2d 556 (1961).

In the case at bar, the Federal District judge exceeded the scope of his function and duty to clarify facts presented by witnesses in that he usurped the prosecutorial function. From the record it is clear that on a number of occasions, the prosecutor had to request that the Court permit him an opportunity to continue the examination of witnesses. Prior to this request from the prosecutor, the Court had become an advocate for the government. In Crampton v. Ohio, 91 S.Ct. 1454 (1971) the Court stated that the Constitution requires no more than that criminal trials are fairly conducted and that guaranteed rights of Defendants be "scrupulously" respected. This conduct on the part of the trial

judge deprived the Defendant of his Sixth Amendment right to a fair trial before an impartial trier of fact, thus constituting prejudicial and reversible error.

CONCLUSION

For the reasons set forth above, Petitioner prays that the petition for certiorari be granted.

RESPECTFULLY SUBMITTED,

Walter T. Johnson, Jr.
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APPENDIX A

No. 75-1778

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

UNITED STATES OF AMERICA,

Appellee

v.

KEITH ANTHONY GRANT,

Appellant

Appeal from the United States District Court for the Middle District of North Carolina, at Greensboro. Eugene A. Gordon, District Judge.

Submitted November 10, 1975. Decided December 24, 1975.

Before Winter, Craven and Butzner, Circuit Judges.

PER CURIAM:

Keith Anthony Grant was convicted in a trial without a jury of violating 26 U.S.C. Sec. 5861(d), 5871 by possessing a firearm which had not been properly registered. He has appealed

from that conviction and the denial of his motions for acquittal asserting that insufficient evidence was introduced to support a conviction.

The principles that govern appellate consideration of the sufficiency of the evidence were stated in United States v. Sherman, 421 F.2d 198, 199 (4th Cir.), cert. denied, 398 U.S. 914 (1970): "In considering the sufficiency of the evidence we do not determine whether it convinces us of guilt beyond a reasonable doubt, but only that the evidence would permit the triers of fact to find the defendant guilty beyond a reasonable doubt... The verdict of the [factfinder] must be sustained if there is substantial evidence, taking the view most favorable to the government, to support the findings of guilt." Circumstantial evidence may support a verdict of guilty even though it does not exclude every reasonable hypothesis consistent with innocence. United States v. Van Fossen, 460 F.2d 38, 40 (4th Cir. 1972). The type of possession necessary for conviction under the statutes here involved has been stated as follows: "Possession may be either actual or constructive and it need not be exclusive but may be joint.... Constructive possession exists when a person does not have actual possession but instead knowingly has the power and the intention at a given time to exercise dominion and control over an object,

either directly or through others." United States v. Craven, 478 F.2d 1329 (6th Cir.), cert. denied, 414 U.S. 866, rehearing denied, 414 U.S. 1086 (1973) (citations omitted).

The unregistered firearm was found in a house at 300 Milburn Street, Greensboro, North Carolina. The Defendant listed that address as his residence when he was interrogated approximately one month after the firearm was found. At the time of the search, the defendant was listed as a resident at that address by the City Director, and water and sewer bills for that house were being mailed to him at that address.

Greensboro police obtained admission to the house from a Mr. Williamson who let them in by using a door key after he had been detained by police while driving the defendant's car. The police searched the house pursuant to an unchallenged search warrant and found the unregistered weapon lying in plain view near the bed in one of two bedrooms in the house. In that same room, they found a gasoline bill addressed to the defendant, along with a check and a savings book which bore the defendant's name. In a closet of that room, the police found $9,000.00 which they confiscated and which the defendant later claimed from the police as his.

Considered in light of the standards for appellate review of the sufficiency of the evidence, we cannot say that the evidence was insufficient for the fact-finder to determine beyond a reasonable doubt that the defendant had constructive possession of the unregistered firearm.

Accordingly, we dispense with oral argument and affirm the judgement of the district court.

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1047

KEITH ANTHONY GRANT, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the evidence was insufficient to support a finding that he was in possession of a firearm. He also contends that the district court improperly examined government witnesses.

Following a jury-waived trial in the United States District Court for the Middle District of North Carolina, petitioner was convicted of illegal possession of an unregistered firearm, in violation of 26 U.S.C. 5861(d) and 5871. He was sentenced to 18 months' imprisonment. The court of appeals affirmed (Pet. App.).

On October 31, 1974, a police officer executed a state search warrant at petitioner's home in Greensboro, North Carolina, and seized an unregistered sawed-off shotgun (Tr. 3, 11-12, 25-27). The officer found the shotgun on top of the headboard of a bed in the rear bedroom, where he

also found a gasoline bill addressed to petitioner and a check and a savings book that bore petitioner's name. A cash box containing $9,000 was also found in a closet of the bedroom (Tr. 12-13).

Petitioner was not home at the time of the search. Cecil Williamson let the officer into the house and said that he was petitioner's roommate (Tr. 4, 9-10). The officer arrested Williamson for possession of marihuana after he found the substance in the front bedroom (Tr. 10-11). Several days after the search and seizure, petitioner appeared at the police station with his lawyer and claimed everything that had been confiscated, including the cash, cash box, keys, check, and savings book (Tr. 23).

1. The court of appeals correctly concluded that the evidence was sufficient for the trier of fact to determine that petitioner had constructive possession of the sawed-off shotgun. The firearm was found in a bedroom in which there were papers with petitioner's name as well as money and other items that petitioner said belonged to him. As in *United States* v. *Craven*, 478 F. 2d 1329 (C.A. 6), certiorari denied, 414 U.S. 866, upon which petitioner places principal reliance, there was evidence in addition to occupancy of the house which justified the inference that petitioner possessed the firearm. It was not necessary for the government to disprove Williamson's ownership of the firearm (Pet. 10-11), because a finding of guilt does not require that every hypothesis consistent with innocence be excluded. *Holland* v. *United States*, 348 U.S. 121.

2. Petitioner's additional claim that the court was an advocate for the prosecution (Pet. 13-16) was not raised in the court of appeals and should not be considered by this Court. In any event, the contention is groundless. All four witnesses who testified appeared for the government, and

the questions asked by the court were merely designed to clarify the evidence and elicit the facts (see Tr. 5-6, 8-11, 15-16, 28). As the trier of fact in this bench trial, the court's discretion to ask pertinent questions was especially broad.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1976.